St. John's Law Review

Volume 70
Number 3 *Volume 70, Summer 1996, Number 3*

Article 4

March 2012

Lebron v. National Railroad Passenger Corp. (Amtrak): Another Misapplication of the Public Forum Doctrine

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LEBRON v. NATIONAL RAILROAD PASSENGER CORP. (AMTRAK): ANOTHER MISAPPLICATION OF THE PUBLIC FORUM DOCTRINE

Freedom of thought and speech has been described as "the matrix, the indispensable condition, of nearly every other form of freedom."[1] Nonetheless, the First Amendment right to free speech,[2] although long considered essential to the maintenance of our democratic society,[3] is not absolute.[4] When confronted with a potentially impermissible proscription on the right to free

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[1] Palko v. Connecticut, 302 U.S. 319, 327 (1937) (Cardozo, J., explaining importance of free speech), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969) (overruling *Palko* insofar as it was inconsistent with finding that Double Jeopardy Clause of Fifth Amendment applied to states through Fourteenth Amendment).

[2] U.S. CONST. amend. I. "Congress shall make no law ... abridging the freedom of speech...." *Id.*

[3] *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). Free speech is described as especially important in a democratic society:

> When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, unAmerican as well as American.... The principle of the freedom of speech springs from the necessities of the program of self-government.... It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

Id.; Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977) (asserting that value of free speech is its usefulness in checking abuse of power by public officials), *reprinted in* FREEDOM OF EXPRESSION: A COLLECTION OF BEST WRITINGS 295 (Kent Middleton & Roy M. Mersky eds., 1981).

[4] Certain categories of speech have been deemed less essential to our political process and, therefore, historically have been afforded less protection than other forms of speech. *See, e.g.*, New York v. Ferber, 458 U.S. 747 (1982) (child pornography); Brandenburg v. Ohio, 395 U.S. 444 (1969) (incitement to riot); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words). Such speech is deemed to be "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." Bernard H. Siegan, *Separation of Powers and Economic Liberties*, 70 NOTRE DAME L. REV. 415, 461 (1995).

speech, courts engage in a categorical analysis to determine the appropriate level of First Amendment protection warranted based on the classification of the speaker's chosen forum.[5]

Known as the public forum doctrine, this analysis classifies three types of fora: the traditional public forum, the designated public forum, or the non-public forum. The term, "traditional public forum," stands for the notion that "streets and parks ... have immemorially been held in trust for the use of the public and ... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[6] In this forum, speech receives its greatest protection. Any governmental attempts to restrict speech in a traditional public forum must withstand a strict scrutiny analysis requiring the government to assert a compelling state interest.[7] Public property which has not traditionally been considered a public forum, but which the government has made available to the public for expressive activity, constitutes a "designated public forum."[8] Governmental restrictions on speech made in a forum that is endowed with this "open" character will require the government to meet the same standards applicable to a traditional public forum.[9] Government property which has not been held out as an arena for expression is classified as a nonpublic forum.[10] In such a forum, the state may regulate speech, as long as the regulation is reasonable and not based on the viewpoint expressed by the speaker.[11]

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[5] The term "public forum" was first used by the Supreme Court in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939). Its precise meaning, however, remained largely unknown until the Supreme Court elaborated on it in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

[6] *Hague*, 307 U.S. at 515.

[7] *Perry*, 460 U.S. at 45. The *Perry* court stated:

> For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end .... The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Id.

[8] *Id.*; *see also* Air Line Pilots Ass'n Int'l v. Dep't of Aviation of Chicago, 45 F.3d 1144, 1151 (7th Cir. 1995) (indicating that government may open property up for "all expressive activity ... [o]r ... for more limited purposes such as use by certain groups, ... or discussion of certain subjects.").

[9] *Perry*, 460 U.S. at 46.

[10] *Id.* at 46-49.

[11] *Id.* at 46.

It is a basic precept of the public forum doctrine that, regardless of the forum chosen by a speaker, the government is prohibited from silencing that speaker due to governmental displeasure with the message conveyed.[12] Recently, in *Lebron v. National Railroad Passenger Corp. (Amtrak)*,[13] the United States Court of Appeals for the Second Circuit held that Amtrak, a government entity,[14] could constitutionally refuse to run a paid advertisement criticizing the political views of the makers of Coors beer.[15]

In *Lebron*, Michael A. Lebron,[16] plaintiff, contracted with

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[12] *Id.* at 59 (Brennan, J., dissenting). John Stuart Mill condemned such silencing, espoused free exchange of ideas, and denounced governmental suppression of those ideas as a deprivation of "the opportunity to exchange error for truth." JOHN STUART MILL, ON LIBERTY 16 (1859). Justice Holmes, in his famous dissent in *Abrams v. United States*, 250 U.S. 616, 624 (1919), adopted Mill's position. Holmes stated that, "the ultimate good desired [truth] is better reached by free trade in ideas [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market...." *Id.* at 630. Since Holmes enunciated his theory of the "marketplace of ideas," courts, litigators, and commentators have relied upon it for the proposition that the silencing of speech is an impermissible limit to the free flow of ideas necessary to preserve our democratic government. Alan Howard, City of Ladue v. Gilleo: *Content Discrimination and the Right to Participate in Public Debate*, 14 ST. LOUIS U. PUB. L. REV. 349, 353 (1995).

[13] 69 F.3d 650 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1675 (1996). This was an appeal from the lower court decision, in *Lebron v. Nat'l R.R. Passenger Corp. (Amtrak)*, 811 F. Supp 993 (S.D.N.Y. 1993). *Lebron*, 69 F.3d at 650.

[14] Amtrak is a "government controlled and financed railroad" with facilities "used daily by thousands of people." *Lebron*, 69 F.3d at 658. The federal government established the railroad to pursue federal governmental objectives. Lebron v. Nat'l R.R. Passenger Corp. (Amtrak), 115 S. Ct. 961, 973 (1995). Additionally, the government now controls the Railroad's Board of Directors and subsidizes its losses. *Id.* at 967.

This case has an interesting procedural history. Initially, the United States District Court for the Southern District of New York held that Lebron's First Amendment rights had been violated by Amtrak's refusal to display his advertisement. *Lebron*, 811 F. Supp. at 1005. On appeal, the Second Circuit, reversed on the ground that Amtrak was not a government entity and, therefore, no claim of state action could arise from its acts. *Lebron*, 12 F.3d 388 (1993). The United States Supreme Court, addressing only the narrow issue of whether Amtrak could be considered a government entity, held that Amtrak was a governmental actor for the purposes of public forum doctrine analysis. *Lebron*, 115 S. Ct. at 974-75. The Court declined, however, to decide the central issue regarding Lebron's free speech claim and remanded the case to the Second Circuit to make that determination. *Id.* at 974-75. The Second Circuit's opinion on remand is the focus of this Comment.

[15] *Lebron*, 69 F.3d at 660.

[16] Lebron described himself as "an artist. I do work using photography, graphics, and text to describe personal observations about social or political issues." Robert Neuwirth, *I'd Rather Do Art Than Buy a Jaguar, The New York Newsday Interview with Michael Lebron*, NEWSDAY (City Edition), Feb. 11, 1993, at 123.

Transportation Displays, Inc. ("TDI"), an agent of National Railroad Passenger Corp. ("Amtrak"), to rent the Spectacular, a "curved, back-lit display space approximately 103 feet wide by ten feet high" on the west wall of the rotunda on the upper level of Pennsylvania Station ("Penn Station").[17] The terms of the contract reserved to TDI the right to terminate the contract at any time without notice should "[Amtrak] deem such advertising objectionable for any reason."[18] When Lebron submitted his proposed advertisement,[19] a large work comprised of pictures and text, criticizing the makers of Coors beer for their involvement in and support of right-wing political causes,[20] Amtrak refused to run the display stating that "[Amtrak's] policy is that it will not allow political advertising on the [S]pectacular advertising sign."[21]

The public forum doctrine requires that one first determine the relevant forum under discussion, categorize it as one of the three types of fora, and finally apply the appropriate analysis.[22] Circuit Judge Mahoney, writing for the court, held that the relevant forum for public forum doctrine analysis was the Spectacular, the single billboard for which Lebron contracted.[23] Be-

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[17] *Lebron*, 69 F.3d at 653. In his complaint, plaintiff alleged that the Spectacular is a "unique advertising location in the City of New York." *Id.*

[18] *Id.* at 653.

[19] *Id.* at 656. Lebron described his advertisement as social realism for "consumer, corporatist society." Todd S. Purdum, *At Home with Michael Lebron*, N.Y. TIMES, Jan. 28, 1993, at C1.

[20] The Coors family has been "denounced as racist, sexist, union-bashing, right-wing fanatics." Bella Stumbo, *Brewing Controversy Coors Clan*, L.A. TIMES, Sept. 18, 1988, at 1. Joseph Coors, a long-time friend of Ronald Reagan and one of the controlling members of the Coors family, has made substantial contributions to such right-wing causes as the John Birch Society, the Heritage Foundation, and groups opposing the equal rights amendment. *Id.* One of his most controversial contributions was a personal donation of a $65,000 airplane to the Nicaraguan "freedom fighters," an act for which he received an invitation to testify at the Iran-Contra hearings. *Id.*

[21] *Lebron*, 69 F.3d at 654. Lebron contended that, although he never discussed in depth the precise subject matter of his artwork, he did inform TDI at the time of the contract that his work was generally political. *Id.* at 653.

[22] *See* Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985) (providing detailed description of public forum doctrine requirements).

[23] *Lebron*, 69 F. 3d at 655. The court relied on *Cornelius v. NAACP Legal Defense and Education Fund,* in holding the court should restrict its public forum analysis to consideration of the Spectacular billboard alone rather than the sum total of advertising space in Penn Station. *Lebron,* 69 F.3d at 655 (citing *Cornelius,* 473 U.S. at 802). In *Cornelius*, the Supreme Court held that the forum to be considered in plaintiff's challenge of its restriction from participation in a fundraising

cause Amtrak had never before run a political advertisement on the Spectacular,[24] the court concluded that the Spectacular was "most likely ... a nonpublic forum."[25] The court consequently found that Amtrak's rejection of Lebron's advertisement was permissible as a viewpoint-neutral decision based on the subject matter and not the content of the advertisement.[26] The court then decided that Amtrak's decision to reject all political advertisements was reasonable in light of Amtrak's interest in avoiding controversy and embarrassment.[27]

In his dissent, Chief Judge Newman argued that the majority erred in concluding that the Spectacular was the proper forum for analysis.[28] He claimed that "[n]o prior case has taken such a restricted view of the relevant forum."[29] He therefore concluded that the appropriate forum for consideration was the rotunda,[30] the central area of Penn Station of which the Spec-

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drive in the federal workplace was the fundraising drive only and not the workplace generally. *Cornelius*, 473 U.S. at 802. The *Lebron* court also focused on the Spectacular's "unique size, location, and visibility" and the fact that this was the only advertising venue to which Lebron sought access and Lebron's refusal to accept any alternative space offered by TDI. *Lebron*, 69 F.3d at 655.

[24] The court refers to the Spectacular's 26-year history, during which the billboard had only been used for the display of commercial advertisements. *Lebron*, 69 F.3d at 654.

[25] *Id.* at 656. The court's public forum doctrine analysis cites *Cornelius*, 473 U.S. 788, and *Calash v. City of Bridgeport*, 788 F.2d 80, 84 (2d Cir. 1986) (finding that municipal sports stadium was "non-public forum where the City may make reasonable restrictions on expression."), but the court seems to rush to the conclusion that the Spectacular was a nonpublic forum without articulating its reasoning in support of this categorization. *Lebron*, 69 F.3d at 656.

[26] *Lebron*, 69 F.3d at 656.

[27] *Id.* The court relied on a 1974 decision by the Supreme Court, *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), for the proposition that a public entity engaged in commerce may limit the type of advertising it chooses to display as long as its choices are reasonable and its policies and practices are not "arbitrary, capricious, or invidious." *Lehman*, 418 U.S. at 303.

[28] *Lebron*, 69 F.3d at 660 (Newman, C.J., dissenting).

[29] *Id.* Newman discussed the facts of *Cornelius*, 473 U.S. 788, and indicated that the relevant focus in defining the scope of the forum is the "particular means of communication." *Lebron*, 69 F.3d at 660 (Newman, C.J., dissenting) (quoting *Cornelius*, 473 U.S. at 801). Newman went on to discuss *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 37, because *Cornelius* relied on *Perry's* holding that the forum was the school district's interschool mail system, not the teachers' individual mailboxes, nor the mailboxes of one school within the district. *Lebron*, 69 F.3d at 660 (Newman, C.J., dissenting). Similarly, Newman contended that in *Lehman*, the analysis was confined to the advertising space on city-owned buses and not solely the space on one bus. *Lebron*, 69 F.3d at 661 (Newman, C.J., dissenting).

[30] *Lebron*, 69 F.3d at 661 (Newman, C.J., dissenting).

tacular forms one wall.[31] Rather than focus on the specific billboard for which Lebron contracted, Newman sought to define as Lebron's forum "the means of communication to which Lebron sought access."[32] Clearly, Lebron sought access to the rotunda. Newman stated that, once the forum was properly defined, the unconstitutionality of Amtrak's refusal to accept Lebron's artwork was clear.[33] Because Amtrak had leased space in the rotunda to *The Plain Truth*, "a magazine ... devoted to 'political and social issues,'"[34] Newman argued that Amtrak should have been foreclosed from denying Lebron access to this same advertising venue since his advertisement carried a similar message.[35] Newman further argued that, even if the court was correct limiting the forum to the Spectacular, it erred in focusing solely on Amtrak's past practices to determine the nature of the forum. Rather, the appropriate analysis required consideration of both "policy and practice."[36] This consideration led Chief Judge Newman to conclude that Amtrak's policy with respect to political advertisements was "unwritten, unclear, and undisseminated."[37]

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[31] *Id.* "[P]ublic forum analysis cannot be so particularized as to focus on one of several billboards on government property, no matter how preferable that one billboard's size and location may be to an advertiser." *Id.* Judge Newman argues that, although the two billboards on the north and south walls of the rotunda were smaller in size than the Spectacular, it was inconceivable that, were one political party allowed to run a political advertisement on either of those walls, a competing political party would be denied access to the Spectacular for the same purpose. *Id.*

[32] *Id.* at 661.

[33] *Id.*

[34] *Id.* (quoting majority opinion).

[35] *Lebron*, 69 F.3d at 661. "It is clearly unconstitutional for Amtrak to permit its advertising space in the rotunda to be used to convey the message of *The Plain Truth* and deny space in the same rotunda to the message that Lebron believes conveys the plain truth about the brewers of Coors beer." *Id.*

[36] *Id.* (quoting *Cornelius*, 473 U.S. at 802, and citing *Lehman*, 488 U.S. at 303).

[37] *Lebron*, 69 F.3d at 662 (Newman, C.J., dissenting). Newman pieced together Amtrak's policy by considering: the language of the agreement between Amtrak and TDI, the district court's finding that "neither [of the] key Amtrak official[s] responsible for supervising Amtrak's arrangements with TDI ... knew of any prohibition on political advertising at any of Amtrak's facilities.... other key Amtrak officials could not agree on what Amtrak's policy was," and TDI's guidelines "do not prohibit political advertisements" but label them commercial. *Id.* at 661-62. The relevant language of the contract between Amtrak and TDI stated: "All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion." *Id.* (quoting in *Lebron*, 811 F. Supp. 993, 1002). Newman stated that, "[i]t is difficult to imagine a more standardless statement of policy." *Id.* When asked for an explanation of the stated policy, one key Amtrak official "testified that the policy prohibited only those advertisements that were both 'political and divisive

As such, it provided "ample basis for the [district court's] ultimate conclusion that the policy permitted the unfettered exercise of discretion and created the risk of abuse that the First Amendment prohibits."[38]

Newman considered an additional argument not addressed by the majority: namely, that Amtrak's willingness to accept an advertisement encouraging the purchase of Coors beer rendered its refusal to accept Lebron's advertisement discouraging that purchase a content-based restriction on plaintiff's First Amendment rights.[39] Choosing not to reach the issue, however, Newman instead determined that issues previously addressed resolved the dispute in Lebron's favor.[40]

It is submitted that the majority erred both in its definition and categorization of the relevant forum. Its restriction of the forum analysis to the Spectacular seems to indicate a result-oriented approach, particularly because the court seemed to engage in little analysis beyond its initial inquiry into the past leasing practices of the Spectacular. It is further submitted that the dissent reached the correct conclusion, but erred in limiting its public forum doctrine analysis solely to considering whether Amtrak engaged in impermissible viewpoint discrimination.

Part I of this Comment discusses the current status of the

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or objectionable,' while another could not say what the policy meant." *Id.*

[38] *Lebron*, 69 F.3d at 662 (Newman, C.J., dissenting). Newman provides a full discussion of why a government actor's stated policy must limit its discretion to accept or reject advertisements:

> [W]here a policy is unwritten, unclear, and undisseminated, the fact that it has not yet been used discriminatorily does not save it from invalidation under the First Amendment. The vice of conferring unfettered discretion on government officials to determine which messages may be conveyed is not avoided by their past pattern of not making a discriminatory decision. The vice inheres in the opportunity for discrimination, and the First Amendment requires that opportunity to be held to an acceptable minimum by a clear and well understood policy that appropriately limits the discretion of the officials who must administer it.

Id. Newman quoted the Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) as stating, "The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility." *Lebron*, 69 F.3d at 662 (Newman, C.J., dissenting).

[39] *Id.* The majority characterized Lebron's viewpoint discrimination argument "plainly specious." *Id.* at 659 n.4.

[40] *Id.* at 663 (Newman, C.J. dissenting) ("I need not decide whether to accept Lebron's argument since his other positions are well supported on this record."). The majority quoted Lebron as claiming, "I do not seek to sell anything other than ideas with this advertisement," in finding his argument sophistical. *Id.* at 659 n.4.

public forum doctrine and suggests that the *Lebron* court misapplied the doctrine. It concludes that, within the context of proper public forum doctrine analysis, the means of communication to which the plaintiff sought access was a designated public forum. Part II analyzes the restriction placed on plaintiff's speech and asserts that the policy was, on its face and as applied, content and viewpoint based and, therefore, should have received strict scrutiny. It suggests that Amtrak's stated policy represented an impermissible infringement on the right to free speech because it granted Amtrak officials unfettered discretion in choosing which advertisements to accept or reject.

I. PUBLIC FORUM DOCTRINE

A. *The Current State of Public Forum Doctrine Analysis*

In recent years, the Supreme Court's application of the public forum doctrine has come under attack by critics who claim it has been used as a device to curtail the right to free speech.[41] For example, in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*,[42] the Court held constitutional the government's decision to exclude certain groups from an organized charity drive aimed at federal employees and held in a federal workplace.[43] The Court defined the relevant forum to be the Combined Federal Campaign ("CFC").[44] It concluded that a consideration of CFC's past practices and policies[45] revealed that CFC

[41] *See* David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143 (1993) (discussing Court's erosion of right to free speech, focusing on Court's plurality opinion in United States v. Kokinda, 497 U.S. 720 (1990)); *see also* United States v. Kokinda, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting) ("Ironically, these public forum categories—originally conceived of as a way of *preserving* First Amendment rights ... —have been used in some of our recent decisions as a means of upholding restrictions on speech.") (emphasis in original); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 993 (2d ed. 1988) (providing general discussion of why public forum doctrine "can leave speech inadequately protected"); C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1986) (discussing how application of public forum doctrine results in situations in which "free speech values tend to be minimized or ignored; government interests tend to be emphasized and exaggerated.").

[42] 473 U.S. 788 (1985).

[43] *Id.* at 808.

[44] *Id.* at 801 ("The CFC is an annual charitable fundraising drive conducted in the federal workplace during working hours largely through the voluntary efforts of federal employees.").

[45] *Id.* at 804. Such past practices and policy include an executive order indicat-

was a nonpublic forum.[46] Therefore, the government only needed to show that its decision to exclude the petitioners from the CFC was viewpoint neutral and reasonable in light of its purpose.[47]

Similarly, in *Perry Educators' Association v. Perry Local Educators' Association*,[48] the Court held constitutional a school district's refusal to grant the plaintiff, Perry Local Educators' Association ("PLEA"), an outside teachers' union, access to the school mail system. The school district refused access to PLEA while it granted such access to the teachers union with whom the teachers in the school district had contracted.[49] The Court identified the school mail system as the relevant forum[50] and found that the policy and practices of the school district with regard to the mail system[51] indicated that the mail facilities consti-

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ing that the CFC was open to "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate." *Id.* at 792 (quoting Exec. Order No. 10927, 3 C.F.R. 454 (1959-1963 Comp.)). In addition, the *Civil Service Commission's Manual on Fund-Raising* limited participation to "[o]nly tax-exempt, nonprofit charitable organizations that were supported by contributions from the public and that provided direct health and welfare services to individuals." *Cornelius*, 473 U.S. at 792 (quoting Manual on Fundraising § 5.21 (1977)).

[46] *Id.* at 805. The Court relied on the revised CFC Cameron which limited organizations to a single thirty word expression of their activities and purpose because this limitation indicated a move away from previous more open fora. *Id.* The court thus concluded that the government's intention was to create selective access and not a public forum. *Id.*

[47] *Id.* at 806; *see also supra* notes 5-11 and accompanying text discussing various levels of judicial scrutiny.

[48] 460 U.S. 37 (1983).

[49] *Id.* at 55 (Brennan, J. dissenting). In his dissent, Brennan explained, "[t]he court today holds that an incumbent teachers' union may negotiate a collective-bargaining agreement with a school board that grants the incumbent access to teachers' mailboxes ... and denies such access to a rival union." *Id.* at 55-56.

[50] *Id.* at 47-48. The majority found the school's selective grant of access to certain civic and church organizations did not transform its internal mail system into a public forum. *Id.* at 47.

[51] The Court sidestepped the fact the school board had, in fact, changed its policy with regard to the mailboxes by focusing, instead, on the reason for the change in policy:

> PLEA ... points to its ability to use the school mailboxes and delivery system on an equal footing with PEA prior to the collective-bargaining agreement signed in 1978. Its argument appears to be that the access policy in effect at that time converted the school mail facilities into a limited public forum generally open for use by employee organizations, and that once this occurred, exclusions of employee organizations thereafter must be judged by the constitutional standard applicable to public forums. The fallacy in the argument is that it is not the forum, but PLEA itself, which has changed. Prior to 1977, there was no exclusive representative for the Perry School District teachers.... Therefore, the ... policy of allowing both organizations to use the school mail facilities simply reflected the fact that both

tuted a nonpublic forum.[52] The Court concluded, therefore, that the denial of access to the nonpublic forum was constitutional, as it constituted a reasonable, viewpoint-neutral decision restriction.[53]

Last year, however, in *Rosenberger v. Rector of University of Virginia*[54] and *Capitol Square Review v. Pinette*,[55] the Court found two bans on free speech unconstitutional. In *Rosenberger*, the University of Virginia refused to allocate to a Christian student group money from the Student Activities Fund ("SAF") for the printing of their student newspaper, *Wide Awake*. The school had distributed SAF guidelines which prohibited the use of SAF funds for any student activity which "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[56] Although the students brought their claims under both the Speech and Establishment Clauses of the First Amendment,[57] the Court's analysis of the free speech claim extended only to a discussion of viewpoint discrimination and did not focus on the public forum doctrine.[58] Because the school had

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> unions represented the teachers and had legitimate reasons for use of the system.... [and the policy] did not constitute creation of a public forum in any broader sense.

Perry, 460 U.S. at 48. This argument seems to indicate that there is nothing to be learned by looking at past policy and practices in determining the proper classification of the forum because, clearly, as long as the government has chosen to change its policy and provides reasons for doing so, the forum can be deemed reclassified for purposes of public forum doctrine analysis. Further, it seems odd that in *Perry*, the Court's willingness to go through the motions of public forum analysis renders it incapable of recognizing the viewpoint discrimination inherent in the school district's refusal to allow PLEA access to the school mail system it makes readily available to a competing union. "In focusing on the public forum issue, the Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic." *Id.* at 57 (Brennan, J., dissenting).

[52] *Id.* at 46; *see also supra* notes 48-50 and accompanying text.

[53] *Perry*, 460 U.S. at 46-67. The dissent, meanwhile, saw this more as an equal access claim than a public forum claim. *Id.* at 56 (Brennan, J., dissenting) (finding clear viewpoint discrimination).

[54] 115 S. Ct. 2510 (1995).

[55] 115 S. Ct. 2440 (1995).

[56] *Rosenberger*, 115 S. Ct. at 2515 (quoting University of Virginia Guidelines governing SAF).

[57] *Id.*; *see supra* notes 1-4 and accompanying text discussing various clauses of the First Amendment.

[58] *Rosenberger*, 115 S. Ct. at 2516-20. As part of this failure to focus, the Court cited *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), to impliedly conclude that the University's policy created a forum from which it could exclude one group over another. *Rosenberger*, 115 S. Ct. at 2516.

extended money for printing to publications espousing other groups' views, the Court found that the school's denial of money to this group for the same purpose constituted impermissible discrimination on the basis of the speaker's viewpoint.[59] In its analysis of the school's Establishment Clause defense, the Court determined that a viewpoint-neutral disbursement of school money that did not favor the religious group over other student groups did not violate the Establishment Clause.[60] The Court thus held that the school's adherence to the Establishment Clause did not require that it proscribe the student group's right of free speech and, so, Establishment Clause concerns could not serve as a basis for that proscription.[61]

Similarly, in *Capitol Square Review*,[62] both Free Speech and Free Exercise Clause issues were raised. There, the government had designated public grounds for use as a public forum, but denied a request by the Ku Klux Klan for permission to erect a free-standing cross on Capitol Square during the December holiday season.[63] The Court held that, here too, the restriction on petitioners' speech was not constitutionally permissible and that allowing such speech did not constitute a violation of the Establishment Clause.[64] The holding here rests on the clear

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[59] *Rosenberger*, 115 S. Ct. at 2517-18. The Court then turned to the question of whether the Establishment Clause's prohibition on governmental endorsement of religion offered sufficient basis for this governmental violation of the students' right to free speech. *Id.* at 2520. The Court found that it did not, since the disbursement of this money constituted a neutral expenditure which conferred on this group no greater benefit than that conferred on any other student group. *Id.* at 2532-33.

[60] *Id.* at 2525. The Court indicated that "there is no real likelihood that the speech in question is being either endorsed or coerced by the State." *Id.* at 2523. It further stressed the fact that "[a]ny benefit to religion is incidental to the government's provision of secular services for secular purposes on a religion-neutral basis. Printing is a routine, secular, and recurring attribute of student life." *Rosenberger*, 115 S. Ct. at 2524.

[61] *Id.* at 2525. The Court goes even further in stating that the school's attempt to regulate the speech of the student group created the risk of "fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.*

[62] 115 S. Ct. 2440 (1995).

[63] *Id.* at 2445. Capitol Square was a state-owned, ten-acre, parcel of land surrounding the state capitol in Ohio. *Id.* at 2444. It is widely used by political activists and religious groups. *Id.* In November 1993, the Capitol Square Review and Advisory Board authorized the state to erect its annual Christmas tree. *Id.* at 2445. Similarly, the Board granted a rabbi's request to erect a menorah. *Id.* Soon after, the Board denied the Ku Klux Klan's request to erect a Latin Cross in Capitol Square. *Id.*

[64] *Id.* at 2450 ("Religious expression cannot violate the Establishment Clause

statement by the government of its intent to create a public forum;[65] such clear intent left the Court no alternative but to regard Capitol Square as such. Therefore, while a victory for the Ku Klux Klan, the holding in this case offers no real indication of whether the Court will alter its treatment of less clearly established public fora, or widen the scope of its public forum analysis. As a result, *Capitol Square Review*, like *Rosenberger*, offers little cause for celebration among supporters of the right to free speech.

B. The Lebron Court's Misuse of the Public Forum Doctrine

Even within the context of the limitations which have been placed on the right to free speech, the majority's public forum doctrine analysis in *Lebron* was fundamentally unsound. In *Lebron*, the majority simply classified the Spectacular as "most likely ... a nonpublic forum."[66] The dissent did not even reach the issue of classification, as its definition of the forum resulted in its clear recognition that Amtrak practiced viewpoint discrimination, eliminating the need to inquire into whether the rotunda was a public or nonpublic forum.[67] It is maintained that the superficial public forum doctrine analysis engaged in both opinions is representative of the level of judicial analysis which

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where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms. Those conditions are satisfied here; therefore, the state may not bar respondent's cross from Capitol Square.").

[65] *Id.* at 2444. Even a court reluctant to recognize designated public fora could not disregard the clear intent exhibited by the government in creating Capitol Square:

> Capitol Square is a 10-acre, state-owned plaza surrounding the Statehouse in Columbus, Ohio. For over a century the square has been used for public speeches, gatherings, and festivals advocating and celebrating a variety of causes, both secular and religious. Ohio Admin. Code Ann. § 128-4-02(A) (1994) makes the square available "for use by the public ... for free discussion of public questions, or for activities of a broad public purpose" and [another Ohio statute] gives the Capitol Square Review and Advisory Board responsibility for regulating public access. To use the square, a group must simply fill out an official application form and meet several criteria, which concern primarily safety, sanitation, and non-interference with other uses of the square, and which are neutral as to the speech content of the proposed event.

Id. (citations omitted). Armed with 100 years of past practices and two statutes declaring the square open to the public for all forms of expression, the Court was left with no choice but to classify the square as a public forum.

[66] Lebron v. Nat'l R.R. Passenger Corp. (Amtrak), 69 F.3d 650, 656 (2nd Cir. 1995), *cert denied*, 116 S. Ct. 1675 (1996).

[67] *Id.* at 661 (Newman, C.J., dissenting).

is placing the First Amendment right to free speech in jeopardy.[68] The court's failure to even classify the forum as either a nonpublic or designated public forum[69] creates the implicit impression that an individual's speech is only protected in a traditional public forum.

The *Lebron* court mistakenly relied on *Lehman v. City of Shaker Heights*,[70] in which a candidate for public office challenged a city ban on political advertisements on buses.[71] There, the court held that, even though commercial and public service advertisements were permitted on buses, the city's decision to reject plaintiff's campaign advertisements was constitutional because it was reasonable in light of the governmental actor's purpose.[72] The inclusion of a lengthy quote from *Lehman* in the text of the *Lebron* majority opinion,[73] however, only serves to highlight the dissimilarities between the cases. The *Lehman* court stressed that city buses bore no resemblance to a traditional public forum: "we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare."[74] Penn Station, on the other hand, largely resembles a traditional public forum and serves as a thoroughfare.[75] It is a public terminal through which thousands of people pass each day; it serves as a meeting place for commuters; it serves as a conduit through which people pass to get from one outside sidewalk to another. Thus, if one were to follow the reasoning in *Lehman*, while Penn Station may not be a traditional public forum, it could certainly be categorized as a designated public forum and, therefore, would be entitled to the same level of scrutiny.[76]

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[68] *See* Cornelius v. NAACP Legal Def. and Educ. Fund, 473 U.S. 788, 821 (1985) (Blackmun, J., dissenting) (describing Court's misuse of public forum doctrine, stating, "[r]ather than taking the nature of the property into account in balancing the First Amendment interests of the speaker and society's interests in freedom of speech against the interests served by reserving the property to its normal use, the Court simply labels the property and dispenses with the balancing.").

[69] *Lebron*, 69 F.3d at 656.

[70] 418 U.S. 298 (1974).

[71] *Lebron*, 69 F.3d at 657.

[72] *Lehman*, 418 U.S. at 303-04.

[73] *Lebron*, 69 F.3d at 656-57.

[74] *Lehman*, 418 U.S. at 303.

[75] Webster's Dictionary defines "thoroughfare" as "a way or place for passage, ... a street open at both ends, ... [or] a main road ... passage, transit." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1228 (1989).

[76] The government's intent determines if a forum is a designated public forum. Cornelius v. NAACP Def. and Educ. Fund, 473 U.S. 788, 802 (1985); *see* Day, *supra*

Moreover, the *Lehman* court offered, as a basis for its judgment, its determination that "[t]he city *consciously* has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience."[77] While the city in *Lehman* had a well articulated, clear policy regarding its prohibition against political advertising,[78] the same cannot be said of Amtrak. In fact, even the Amtrak officials charged with the enforcement of the policy did not exhibit any clear knowledge or understanding of that policy.[79]

C. *The Relevant Forum and Its Proper Categorization as a Designated Public Forum*

A proper analysis requires that a court not only look at policy and past practices to determine whether and to what extent the government had opened a forum for expression, but that it then follow the analysis through to its conclusion and inquire into the boundaries of that forum and whether the speech at issue falls within those boundaries.[80] Such an analysis required the *Lebron* court to engage in a balancing test to determine whether Amtrak's interest in avoiding controversy was sufficient to warrant the violation of plaintiff's right to be heard.[81] It is suggested that the *Lebron* majority failed to address adequately *Air Line Pilots Association International v. Department of Avia-*

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note 41, at 177. For analysis purposes, the forum begins with a "presumption of openness." *Id.* at 178. Thereafter, it is incumbent upon the government to establish that it intended to close the forum and thereby overcome the presumption. *Id.*

[77] *Lehman*, 418 U.S. at 304 (emphasis added).

[78] *Id.* at 299. The city's agreement with Metromedia, Inc., an advertising space rental agent, included a clear provision which stated explicitly that Metromedia "shall not place [*p*]*olitical* advertising in or upon ... or about any ... space granted hereunder." *Id.* The city also provided Metromedia with a written statement of its policy, which states that "[*p*]*olitical* advertisements will not be accepted on [the listed transit systems]." *Id.* at 300 n.1 (emphasis added).

[79] *Lebron*, 69 F.3d at 662 (Newman, C.J., dissenting).

[80] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

[81] *Lebron*, 69 F.3d at 658. The only discussion devoted to this type of analysis indicates that "Amtrak's decision, as a proprietor, to decline to enter the political arena, even indirectly, by displaying political advertisements is certainly reasonable.... [It is] highly advisable to avoid the criticism and the embarrassments of allowing any display seeming to favor any political view." *Id.* Here, the court supports Amtrak's reasons for wanting to avoid accepting political advertising without articulating what those reasons are. Further, if one were to follow the court's reasoning to its eventual conclusion, the mere fact that an advertisement is controversial will render it avoidable.

tion of Chicago,[82] which presented a factual setting substantially similar to *Lebron* and offered sound analysis that should have been applied.

In *Air Line Pilots Association*, the Air Line Pilots Association ("ALPA"), the collective bargaining representative for Air Wisconsin, challenged the Department of Aviation's ("DA") refusal to allow ALPA to place an advertisement honoring the Air Wisconsin pilots[83] in one of the diorama display cases at O'Hare airport.[84] At the time that ALPA and Transportation Media Inc. ("TMI"), DA's agent for the lease of diorama display cases, entered into a contract to rent the space, TMI did not know the content of the advertisement.[85] The contract contained a clause granting the Commissioner of Aviation the right to remove any advertisements deemed "unaesthetic or objectionable for any reason whatsoever."[86] Hours after the diorama was installed, TMI removed it.[87] The United States Court of Appeals for the Seventh Circuit defined the relevant forum to be the advertising space within the airport rather than the airport as a whole.[88] The court then set out what it believed to be the proper framework for deciding the categorization of the relevant forum as traditional public, designated public, or nonpublic. According to the Seventh Circuit, a court should look at the government's intent in establishing and maintaining the forum.[89] In determining the intent, two factors should be focused on: first, "the policy and practice of the government with respect to the property"; and, second, "the nature of the property and its compatibility with ex-

[82] 45 F.3d 1144 (7th Cir. 1995). Because this was an appeal from a dismissal of plaintiff's claim, the lower court did not engage in findings of fact. As a result, in some instances, the court is unable to come to conclusions because of the insufficiency of the record.

[83] Although the advertisement could be viewed as honoring Air Wisconsin pilots, it also constituted an attack on United Air Lines; It expressly blamed United for selling off pieces of its company, resulting in increased unemployment throughout the industry. *Id.* at 1147.

[84] *Id.*

[85] *Id.* at 1148.

[86] *Id.*

[87] *Air Line Pilots Ass'n Int'l*, 45 F.3d at 1148.

[88] *Id.* at 1152. "[C]hannels for public communication ... may well exist within the greater piece of government property. This much is true here. Because ALPA sought access to the advertising space and not to the airport as a whole, the advertising space is the proper focus of forum analysis." *Id.*

[89] *Id.*

pressive activity."[90]

An examination of Lebron's claim within the preceding public forum doctrine analysis reveals that the majority in *Lebron* erred in defining the Spectacular as the relevant forum. The court based its decision on the fact that the Spectacular is the sole billboard to which Lebron sought access.[91] If this were accepted as the appropriate determining factor in defining the relevant forum, it would result in a requirement that every billboard in Penn Station be evaluated independently. Such a requirement would lead to the absurd result, that on the same wall, two otherwise equivalent advertisement spaces could be distinguished from each other by the advertisements each previously carried, resulting in one being characterized as a public forum and the other as a nonpublic forum. Further, should Amtrak wish to maintain the established character of the fora, it would have to make decisions regarding which advertisements to accept based on the number of public fora it had available at the time to carry those announcements. Such a result is clearly unworkable and ludicrous but is, nonetheless, the logical result of the reasoning used by the majority.

A far more practical approach is to characterize the relevant forum based on the "access sought by the speaker."[92] Clearly, Lebron sought only to display his advertisement on the Spectacular; however, much of the value attached to that venue may be attributed to its location in the rotunda, the portion of Penn Station through which many commuters pass, thereby permitting his expression to receive the greatest exposure.[93] Hence, the relevant forum in *Lebron* was the rotunda, not the Spectacular.[94] To characterize the rotunda, therefore, the court should have considered Amtrak's past practices and policy with regard to accepting advertisements within the rotunda as a whole.[95] Since Amtrak accepted an advertisement of a political nature in the ro-

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[90] *Id.*

[91] Lebron v. Nat'l R.R. Passenger Corp. (Amtrak), 69 F.3d 650, 655 (2d Cir. 1995), *cert. denied,* 116 S. Ct. 1675 (1996).

[92] Cornelius v. NAACP Def. and Educ. Fund, 473 U.S. 778, 801 (1985); *Air Line Asso'n Int'l,* 45 F.3d at 1151.

[93] *See* Richard Perez-Pena, *Amtrak Sued Over Barring of Billboard*, N.Y. TIMES, Dec. 31, 1992, at B1.

[94] *Lebron,* 69 F.3d at 661 (Newman, C.J., dissenting).

[95] *Cornelius*, 473 U.S. at 802.

tunda,[96] its refusal to run Lebron's advertisement constituted viewpoint discrimination. As a result, there would be no need to inquire further into the boundaries of the forum, since, by accepting the advertising of *The Plain Truth*, Amtrak had opened the forum to political advertising. Thus, Amtrak had, at minimum, opened the rotunda up as a designated public forum.[97]

II. THE APPROPRIATE ANALYSIS APPLICABLE TO AMTRAK'S STATED POLICY

In light of the conclusion that the rotunda in Penn Station was a designated public forum in Part I of this Comment, it is submitted that Amtrak's policy prohibiting political advertising in the Spectacular should have been held to be unconstitutional on its face and as applied. In examining a government policy that restricts speech on government property, a court should consider several factors: first, the past content of the relevant forum;[98] second, the standards to which the official making the determination must adhere;[99] and third, the consistency with which such determinations are made.[100] It is asserted that the *Lebron* court should have applied this analysis, as did the court in *AIDS Action Committee of Massachusetts, Inc. v. Massachusetts Bay Transportation Authority*.[101]

In *AIDS Action Committee*, the AIDS Action Committee of Massachusetts, Inc. ("AAC")[102] submitted seven proposed public service announcements to the Massachusetts Bay Transport Authority ("MBTA") for display.[103] The MBTA objected to the content of the advertisements,[104] which "included headlines and copy which, to varying degrees, involved the use of sexual innu-

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[96] *The Plain Truth* is a free magazine on political and social issues distributed at a 7-foot kiosk positioned in front of the Spectacular. *Lebron*, 69 F.3d at 654. The kiosk also displays an advertisement for the magazine. *Id.*

[97] *See supra* note 76 and accompanying text.

[98] *See Air Line Pilots Ass'n Int'l*, 45 F.3d at 1155.

[99] *See id.*

[100] *See id.*

[101] 42 F.3d 1 (1st Cir. 1994).

[102] AAC is a "not for-profit corporation which includes among its main purposes AIDS education of the general public, individuals at high risk of HIV infection, and health care professionals." *Id.* at 3.

[103] *Id.*

[104] Each of the ads contained a large color picture of a condom wrapped in a package and stated that latex condoms were an effective means of preventing the transmission of HIV. *Id.*

endo and double entendre."[105] Despite its previous objections, the MBTA eventually ran all seven announcements and, as a result, received a significant number of complaints.[106] Shortly after this response, the MBTA issued its Commercial and Public Service Advertising Policy, which provided guidelines regarding acceptable advertising.[107] AAC subsequently submitted another suggestive advertising campaign[108] which the MBTA, after much debate, refused to run unless ACC agreed to edit the advertisements to conform to the acceptable standards.[109] Contemporaneously, however, the MBTA accepted and ran two advertisements for the movie "Fatal Instinct," both of which contained suggestive pictures and language.[110] The court held that the MBTA's prohibition on AAC's use of sexually explicit language was unconstitutional viewpoint-based discrimination in light of the MBTA's acceptance of an equally explicit advertisement for "Fatal Instinct."[111]

In *AIDS Action Committee*, the MBTA had constructed a written policy in direct response to the controversy created by the display of the plaintiff's prior advertisements. This policy included the following guidelines: the advertising must meet minimum requirements "with respect to good taste, decency and community standards as determined by the Authority;"[112] the advertisement must not "appeal to a prurient interest;"[113] the ad-

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[105] *Id.*

[106] *AIDS Action Comm.*, 42 F.3d at 3.

[107] *Id.*

[108] These advertisements each contained a picture of a condom, endorsed the use of condoms for the prevention of the spread of AIDS, and included the AAC hotline phone number. They also, however, contained some suggestive language. For example, one ad maintained that a condom "will make you 1/1000th of an inch larger." Another encouraged readers to "[t]ell him you don't know how it will ever fit." *Id.* at 4.

[109] *Id.* at 4-5.

[110] *Id.* These advertisements each "prominently featured" the bare, crossed legs of a seated woman. One ad displayed the headline "Opening Soon" across the woman's crotch. *Id.* at 5.

[111] The court skipped over any public forum doctrine analysis stating that the record before it was poorly developed and, therefore, facts that it might find necessary for such were not available for its review. *AIDS Action Comm.*, 42 F.3d at 9. The court did not want to make determinations absent relevant information such as when or whether the advertising policy went into effect, particularly as it found the viewpoint discrimination issue dispositive. *Id.* at 9-10. Furthermore, the court described the public forum doctrine analysis as having a "relative murky status." *Id.*

[112] *Id.* at 3.

[113] *Id.*

vertisement "must not describe, in a patently offensive way, sexual conduct;"[114] advertising "containing messages or graphic representations pertaining to sexual conduct will not be accepted."[115] In attempting to ascertain whether this policy was in fact applied by the MBTA, the court noted that, when plaintiff presented the MBTA with its second advertising campaign, plaintiff received from the MBTA "four different and contradictory conclusions regarding the acceptability" of the ads.[116] Further, at no time during its discussions with AAC did the MBTA mention its policy and, in the course of the litigation, the MBTA made no direct references to its policy until it submitted its reply brief.[117] This led the court to conclude that the MBTA policy was, on its face and as applied, not content-neutral.[118]

It is submitted that the *Lebron* court should have engaged in somewhat similar analysis with regard to the Amtrak policy. First, the Penn Station rotunda appeared to be open to indiscriminate public speech. Hence, Amtrak's policy prohibiting use of part of the rotunda, or the Spectacular, for political advertising was a content or subject-matter-based restriction. As the policy can be seen as a content-based restriction in a fully open designated public forum,[119] and Amtrak did not assert a compelling government interest for this restriction,[120] the policy should have been held unconstitutional on its face. Second, even if the rotunda was a more limited designated public forum,[121] previ-

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[114] *AIDS Action Comm.*, 42 F.3d at 4.

[115] *Id.*

[116] *Id.*

[117] *Id.* at 5.

[118] *Id.* at 9.

[119] *See* Air Line Pilots Ass'n Int'l v. Dep't of Aviation of Chicago, 45 F.3d 1144, 1151 (7th Cir. 1995). (stating that government may open its property up for "all expressive activity"); *see also* Calash v. City of Bridgeport, 788 F.2d 80, 82 (2d Cir. 1986) (observing that "when the forum remains open as a whole it is governed by the same standards as a traditional public forum.").

[120] The only interest asserted by Amtrak was its interest in avoiding controversy and embarrassment. *Lebron,* 69 F.3d at 656.

[121] *See Air Line Pilots Ass'n Int'l,* 45 F.3d at 1151 (indicating that government may open property up for "more limited purposes such as use by certain groups . . . or discussion of certain subjects."); *see also Calash,* 788 F.2d at 82 ("Limited public forum for the use of certain speakers or for the discussion of certain subjects, the First Amendment protections provided to traditional public forums only apply to entities of a character similar to those entities the government admits to the forum.").

ously permitted types of speech included political advertising, as exemplified by the announcements for *The Plain Truth*. Lebron's advertisement espoused political views and, therefore, fell within the boundaries of permitted speech in the rotunda. Amtrak, by selectively denying Lebron access to the forum based on his political views, engaged in impermissible viewpoint-based discrimination.[122] Furthermore, in analyzing the Amtrak policy under the relevant factors applied by the *AIDS Action Committee* court, one reaches the following conclusions regarding the rotunda and Amtrak's policy: in the past, the relevant forum has displayed political advertising, the applicable standards of Amtrak's stated policy were unclear,[123] and the policy was not applied consistently because the policy gave Amtrak officials unfettered discretion.[124]

CONCLUSION

The holding in *Lebron* seems to represent a further decay of the right to free speech evident in recent Supreme Court decisions. A close reading of *Air Line Pilots Association* and *AIDS Action Committee*, however, indicates that this decay is neither complete nor necessary. In both cases, the courts reached speech-protective conclusions that were consistent with the authorities relied on by the *Lebron* court. In so doing, they engaged in a critical analysis which resulted in the type of fact-sensitive balancing of rights necessary when a First Amendment right is being proscribed. It is submitted that, had the Second Circuit better defined the relevant forum and then applied the appropriate public forum doctrine analysis, Mr. Lebron's right to free expression would have been upheld.

Catherine Smith

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[122] *See, e.g.*, Rosenberger v. Rector of University of Virginia, 115 S. Ct. 2510, 2516 (1995) (stating that, "[w]hen the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant .... Viewpoint discrimination is thus an egregious form of content discrimination." (citations omitted)).

[123] *See Lebron*, 69 F.3d at 662 (Newman, C.J., dissenting) (acknowledging that Amtrak officials themselves did not have clear understanding of policy).

[124] *See supra* notes 37, 38 and 79 and accompanying text.